STATE OF MICHIGAN

IN THE SUPREME COURT

ON APPEAL FROM THE COURT OF APPEALS
Markey, P.J., Cavanagh and R.P. Griffen, JJ.

JULIE NEAL,

Plaintiff-Appellee,

v

TERRY WILKES,

Defendant-Appellant.
_____/

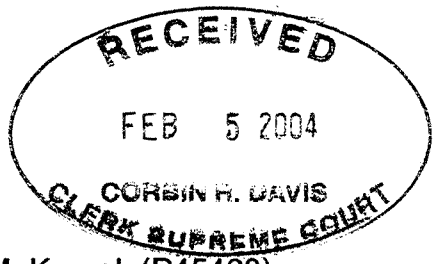
Supreme Court No.: 122498

Court of Appeals No.: 230494

Eaton County File No.: 99-968-NO

BRIEF ON APPEAL OF PLAINTIFF- APPELLEE

ORAL ARGUMENT REQUESTED



Traci M. Kornak (P45468)
TRACI M. KORNAK, P.C.
Attorney for Plaintiff-Appellee
600 McKay Tower
146 Monroe Center NW
Grand Rapids, MI 49503
(616) 458-8000

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Statutes

Court Rules

COUNTER-STATEMENT REGARDING JURISDICTION

On October 24, 2000 Plaintiff filed a timely claim of appeal pursuant to MCR 7.203 and MCR 7.204. On September 17, 2002 the Court of Appeals issued a per curiam unpublished opinion reversing the order entered by the Eaton County Circuit Court granting the Defendant's Motion for Summary Disposition pursuant to MCR 2.116(C)(7).

On October 8, 2002 Defendant filed and Application for Leave to Appeal pursuant to MCR 7.301(A)(2) and 7.302(C)(2)(c). On October 24, 2003 this Court issued an order granting Defendant's application for leave to appeal and directed the parties to include various issues to be briefed relating to the application of MCL 324.73301.

This Court has jurisdiction over the issue before it.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. **DID THE COURT OF APPEALS PROPERLY RULE THAT MCL 324.7330(1) DID NOT APPLY TO PLAINTIFF'S CLAIM FOR INJURIES SUSTAINED ON A DEVELOPED PORTION OF DEFENDANT'S BACKYARD DURING A SOCIAL VISIT?**

The trial court held the answer is: Yes

The Court of Appeals held the answer is: No

Plaintiff-Appellee submits the answer is: No

II. **WHETHER THE MANNER IN WHICH THE LEGISTLATURE PHRASED MCL 324.73301(2) IS SIGNIFICANT TO THE APPLICABILITY OF MCL 324.73301(1) TO RESIDENTIAL PROPERTY?**

Plaintiff-Appellee submits the answer is: Yes

Defendant-Appellant submits the answer is: No
Defendant-Appellant submits the answer is: Yes

III. **WHETHER VIOLATION OF OFF-ROAD RECREATION VEHICLE STATUTES IMPOSE LIABILITY ON DEFENDANT IRRESPECTIVE OF THE APPLICABILITY OF MCL 324.7330(1)?**

Plaintiff-Appellee submits the answer is: Yes

Defendant-Appellant probably submits the answer is: No

IV. **WHETHER THIS COURT SHOULD REVERSE *WYMER* AND *BALLARD*?**

Plaintiff-Appellee's answer is: No as to Wymer.
Yes as to Ballard.

Defendant-Appellant's answer is: Yes

V. WHETHER THE RESOLUTION OF THIS CASE WOULD AFFECT THE GENERAL BODY OF PRINCIPLES GOVERNING OUTDOOR PREMISES LIABILITY?

Plaintiff-Appellee submits the answer is: No

Defendant-Appellant submits the answer is: Yes

COUNTER-STATEMENT OF FACTS

This premise liability action arises out of catastrophic injuries sustained by Julie Neal on July 9, 1998 during a social visit in defendant's backyard while riding as a passenger on the back of an all terrain vehicle (hereinafter "ATV") owned by defendant and driven by his brother, Kim Norman. (Appx Neal dep 35a, 37a, 44a-45a).

Pertinent Facts and Chronology

Defendant's home is located at 10230 Hart Highway on an 11.04-acre parcel on the outskirts of Lansing in the village of Diamondale. The northerly property line borders the right of way line of Interstate 96 with access to the property off Hart Highway just west of Creyts Road. The southerly property line is surrounded by residential homes (Appx Survey, 10a). Defendant's property is in the Maple Heights Subdivision that has been zoned and designated as residential 1B or Single Family Residential for years (Appx Survey, 10a; Appx Affidavit St. Clair 26b, p. 2). In addition to his home, defendant has several other structures in his back and side yards. The defendant's backyard consists of a large lawn area that is followed by a wooded area. (Appx 3b, 4b, 20b; Appx Wilkes dep 22a, p. 18:6). It is uncontroverted that the defendant's lawn has been mowed, well maintained and well groomed for the 12 years that he has owned it. (Appx Wilkes dep 24a, p. 26:3-21; 27:1-4). In fact, the defendant had mowed the lawn in this backyard prior to plaintiff's arrival later that day. (Appx Wilkes dep 22a, p. 26:11-13). The defendant also maintains the trails in the wooded area of

his property. In fact, on the day of the incident he took hedge cutters into the woods to cut the trail area that he made on the property. (Appx Sanchez dep 31b, p. 14:6-8; 14:19-25). The area of defendant's backyard is not undeveloped by any definition. (Appx Wilkes dep 24a, pp. 26-27). This is obvious. (Appx 3b, 4b, 20b).

On July 9, 1998, plaintiff was a social guest on the defendant's property. defendant's brother, Kim Norman and defendant's girlfriend, Elizabeth Sanchez were also there as social guests. (Appx Neal dep 40a, pp. 38:5, 39:1; Appx Wilkes dep 22a p. 20:5-6). It is uncontroverted that plaintiff went there "to visit". (Appx Neal dep 40a p. 38:5, 38:18-20). Defendant admits that this was "just a get together" to "just talk". (Appx Wilkes dep 22a, p. 20:3-6). There were no specific plans or planned activities. (Appx Neal dep 40a, p. 38:4-5).

When Ms. Neal arrived at defendant's home she sat in a lawn chair in the driveway and chatted for about an hour with defendant's brother, defendant and his girlfriend. (Appx Neal dep 40a, p. 39:1-3; 10-12; Appx Sanchez dep 30b, p. 11:3-7). The defendant and his brother were talking about the ATVs. Shortly thereafter, the defendant brought out both of his four-wheeled ATVs and the four went for rides in defendant's backyard. (Appx Neal dep 42a, p. 46; Appx Sanchez Affidavit 21b; Appx Norman dep 55a, p. 12:23-24). Although defendant, defendant's brother, and defendant's girlfriend were experienced ATV users (Appx Wilkes dep 19a, p. 6: 24-25; 23a, p. 21:19), defendant knew that Ms. Neal had never ridden much less driven a ATV. (Appx Neal dep 42a, p.45:9-13; Appx Sanchez dep 30b, p.12:23-25). Notwithstanding, nobody told Ms. Neal that it was illegal to ride as a passenger on these ATV's. (Appx Wilkes dep 23a,

21:13-24). Moreover, defendant knew that these ATVs were not to be ridden double and that it was unsafe. (Appx Wilkes dep 23a, pp. 21-23). Defendant also did not inform or warn plaintiff about the hidden ridged area in his lawn in his backyard. (Appx Wilkes dep 24a, p. 28:22).

Plaintiff took three rides as a passenger on defendant's ATV. The defendant did not tell plaintiff or his brother to put the ATVs away. (Appx Neal dep 43a, pp. 51:21-23; 52:21-25; 44a, p. 56:15-17). Defendant consented to all of these rides, he knew about them, allowed them and was there the entire time they occurred. (Appx Sanchez dep 31b, pp. 13:13; 33b, p, 35:7; 34b, p. 37:7-8).

1) FIRST RIDE: Plaintiff was a passenger on the ATV with defendant's brother. (Appx Neal dep 42a, p. 46:6). After about 10 minutes of riding they rode the ATV back up to the house. (Appx Neal dep 44a, p. 54:7-9). Defendant told his brother not to go into the ravine again. (Appx Neal dep 43a, p. 51:4-9; Appx Sanchez dep 33b, p. 42:16-20).

2) SECOND RIDE: After chatting in the driveway for about 15 or 20 minutes defendant's girlfriend took plaintiff for a short ride in the backyard with defendant's knowledge. (Appx Neal dep 43a, pp. 52:7-17; 44a, p. 54:23-25; 56:21; Appx Sanchez dep 32b, 18:1-11; 33b, p. 36:10-11).

3) THIRD RIDE: Thereafter, the defendant's brother took plaintiff for another short ride. On the way back to the house he drove over the hidden ridges in the defendant's lawn. (Appx Neal dep 45a, pp. 58-67). The injuries occurred on the ridged area of the lawn. (Appx

3b, 4b, 20b; Appx Neal dep 45a, pp. 58:24; 59:1-8; 59:20-24; 46a, pp. 63:18-23; 64:18-20; 47a, p. 66:17-19). This is undisputed. (Appx Wilkes dep 24a, p. 27:22; Appx Neal dep 47a, p. 66; Appx Norman dep 58a, p. 22:3). Plaintiff thought that Norman may have been going too fast, and relied on his judgment as an experienced ATV driver. (Appx Neal dep 45a, p. 60:3; Appx Norman dep 55a, p. 9:2; 11:13).

Plaintiff clearly testified regarding the location of the property where her injury occurred as follows:

> It was on the lawn-closer. Yeah. Like the back part of his lawn. . . It was part of his lawn.
>
> (Appx Neal dep 46a, p. 63:18-21, emphasis added.)

It is uncontroverted that the location where plaintiff was injured was the ridges hidden in the maintained portion of lawn in defendant's backyard near the storage shed, not in the woods. (Appx 3b, 4b, 20b; Appx Wilkes dep 24a, pp. 26-27; Appx McNure Affidavit 17b; Appx Sanchez Affidavit 21b; Appx Neal dep 46a, pp. 63:18, 66:1; Appx Norman dep 58a, p. 22:4). By defendant's own admission, he keeps this area well mowed, well maintained and well groomed and it is not undeveloped by any definition. (Appx Wilkes dep 24a, pp. 26-27; Appx Neal dep 47a, p. 66:1; Appx Sanchez Affidavit 21b, ¶10). This is also obvious. (Appx 3b, 4b, 20b).

It is also uncontroverted that:

1) Plaintiff did not see or know about the ridges hidden in the lawn. (Appx Sanchez dep 36b, p. 45:20; Appx Sanchez Affidavit 21b, ¶10; Appx Neal dep 46a, pp. 63-71:2).

2) Defendant knew that the ridges hidden in the lawn existed. He has ridden over them on his riding mower for 12 years. (Appx Wilkes dep 24a, pp. 26:14-27:6).

3) Defendant's brother knew that the ridges hidden in the lawn existed. (Appx Norman dep 58a, pp. 22:16-23:3).

4) Defendant's girlfriend knew that the ridges hidden in the lawn existed; knew they were dangerous; and would stand up when riding over the area to avoid injury. (Appx Sanchez Affidavit 23b, ¶12; dep 36b, pp. 45:20-46:3).

5) Defendant did not tell plaintiff about the ridges hidden in the lawn or not to ride through the area and knew that plaintiff did know about the condition. (Appx Wilkes dep 24a, pp. 28:18-22; 23a, p. 21:8-24; Appx Sanchez Affidavit 23b, ¶12).

When plaintiff hit this area in defendant's backyard, she was suddenly bounced up into the air and slammed back down on the seat hard, and was immediately in excruciating pain, incurring severe spinal injuries from which she will suffer the rest of her life.[1] (Appx Neal dep 47a, p. 67:1-9; 49a, p. 73:17).

[1] Plaintiff suffered compression fractures that shattered and herniated several discs in her back. She has had two major surgeries. The first resulting in a collapsed spine. The

Procedural Chronology

On August 5, 1999, plaintiff filed her Complaint (Appx 12a) against defendant asserting claims in the alternative for premise and owner liability based on four theories:

1. Defendant was negligent in failing to maintain a safe premises and in failing to warn plaintiff of the unsafe condition of the land. (Appx 12a, ¶14);
2. Defendant negligently entrusted the ATV to an individual who was incompetent. (Appx 12 a, ¶15);
3. Defendant, as owner of the ATV, is vicariously liable for Mr. Norman's negligence, which consisted of:
    a) operating an ATV with a passenger;
    b) failing to make proper observations of the condition of the property;
    c) operating an ATV at a speed too fast for the conditions then existing (Appx 12a, ¶15); and
4. Defendant created or maintained a dangerous condition on the premises which constituted a nuisance. (Appx 12a, ¶23).

On September 20, 1999, defendant filed his Answer to Plaintiff's Complaint and Affirmative Defenses (Appx 11b) through his first attorneys Roberts, Betz and Bloss P.C. The affirmative defense of immunity under MCL 324.73301 was not pled.

---

second resulting in substantial hardware implanted in her back and chest, a hunched over posture, significant physical difficulties and daily pain.

On October 4, 1999, dates were set forth in the Trial Court's Scheduling Order that required motions to amend pleadings shall be filed by January 1, 2000 and that discovery shall be completed by May 1, 2000.

On November 15, 1999, defendant amended his affirmative defenses (Appx 14b) and again he did not assert the defense of MCL 324.73301 immunity. On November 24, 1999, plaintiff objected to defendant's unilateral amendment.

On March 6, 2000, Defendant officially changed attorneys by substituting in attorneys by Worsfold, MacFarlane and McDonald P.L.L.C. into the case.

On April 24, 2000, defendant's new counsel filed and noticed for hearing on May 19, 2000 two motions together: 1) Amend and Add MCL 324.73301 immunity as an affirmative defense; and 2) for Summary Disposition based on this new defense. These motions were filed only 5 days before discovery closed, they were heard almost 3 weeks later, more than 51/2 months after motions to amend pleadings were required to be brought, 1 week after mediation and on the eve of trial, June 14, 2000. Good cause was required to bring this motion. (Appx Hearing Transcript 5/19/00, 39b, p. 8:20 –10).

At hearing, plaintiff's counsel vigorously objected to this amendment because it was too late, "it wasn't originally pled", discovery was over, nothing new had happened, the defense of MCL 324.73301 immunity was known, if it applied, plaintiff would have conducted discovery differently and defendant's new counsel couldn't change his at the last minute without prejudicing Plaintiff. (Appx Hearing Transcript 39b, pp. 3:25, 5:25, 8:20–10) Notwithstanding, the trial court found that the defense of MCL 324.73301 immunity had not been pled yet still allowed the defendant to amend to add MCL 324.73301 immunity as a defense,

and it was prepared to address the Motion for Summary Disposition based on the new defense at that time. (Appx Hearing Transcript 39b, pp. 6:23-7:15; 8:2).

The Motion for Summary Disposition was adjourned for 60 days for additional briefing. On August 18, 2000, the trial court granted defendant's Motion for Summary and dismissed plaintiff's case finding that MCL 324.73301 applied, dismissed plaintiff's claims based on MCL 324.73301 and denied plaintiff leave to amend an exception to it. (Appx Hearing Transcript 8/18/00, pp. 14:16-20:1)

On September 14, 2000, plaintiff filed a Motion for Reconsideration. (Appx 5b), which was denied on October 4, 2000, in a written Opinion and Order. In its Order the trial court held that MCL 324.73301 applied and barred plaintiff's claims because "plaintiff's injury took place on a tract of land that was relatively in its natural state, the land was being used for recreational use" and that "there was no evidence of gross negligence or willful or wanton misconduct" to support plaintiff's request for amendment.

On October 23, 2000, plaintiff timely filed her Claim of Appeal.[2] Following the submission of briefs and oral argument, it issued a per curium decision reversing the trial court's order granting summary disposition pursuant to MCR 2.116(C)(7)and remanding the case to the trial court for continued proceedings. The court held that MCL 324.73301 was inapplicable to the facts in this case.

---

[2] Plaintiff's appeal addressed: 1) Did the trial court err in allowing defendant to amend to add MCL 324.73301 immunity as an affirmative defense that was not pled in his first responsive pleading as required by MCR 2.116(D)(2) and in denying plaintiff the same opportunity to amend to plead an exception to it?; 2) Did MCL 324.73301 apply to a developed portion of defendant's backyard where plaintiff was injured while a passenger riding on the back of an ATV; and 3) Did the trial court err in its cumulative rulings?

The Court of Appeals held:

1. Although nothing in the statutory language indicates that the statute is applicable to the backyards of residential property, the statute has been construed to apply to "large tracts of undeveloped land suitable for outdoor recreational uses", not "urban, suburban and subdivided lands" citing *Wymer, supra* and *Ballard v Ypsilanti Twp*, 457 Mich 564, 577, n 12; 577 NW2d 890 (1998).

2. MCL 324.73301 does not apply where an injury occurs on an improved portion of an otherwise relatively undeveloped tract. *Wilson v Thomas L McNamara, Inc*, 173 Mich App 373, 378; 433 NW2d 851 (1988).

On October 8, 2002 defendant filed an Application for Leave to Appeal with this Court which was granted. In the Court's order granting the application it directed that the parties include among the issues addressed, the following:

1) Whether MCL 324.73301(1):

   a) applies to the plaintiff's injury which occurred on defendant's land;

   b) applies to residential lands;

2) The significance, if any, of the manner in which the Legislature phrased MCL 324.73301(2);

3) Whether this Court should reverse its decisions in *Wymer v Holmes*, 429 Mich 66 (1987), and *Ballard v Ypsilanti Township,* 457 Mich 564, 577 (1998); and

4) How resolution of this case would affect the general body of principles governing outdoor premises liability.

STANDARD OF REVIEW

This Court reviews a trial court's decision to grant summary disposition de novo. *Pohutski v City of Allen Park*, 465 Mich 675; 641 NW2d 219 (2002). Questions of statutory interpretation and application are a question of law that this Court reviews de novo. *Eggleston v Bio-Medical Applications of Detroit*, 468 Mich 29; 658 NW2d 139 (2003). This Court reviews de novo a trial court's ruling on a motion for summary disposition. *Hinkle v Wayne County Clerk*, 467 Mich 337, 340; 654 NW2d 315 (2002). MCR 2.116(C)(7) tests whether a claim is barred because of immunity granted by law, and requires consideration of all documentary evidence filed or submitted by the parties. *Glancy v Roseville*, 457 Mich 580, 583; 587 NW2d 897 (1998).

The standard cited by Defendant for is incorrect. This case was dismissed by the trial court pursuant to MCR 2.116 (C)(7) not MCR 2.116(C)(10). The trial court held that that Defendant was immune for Plaintiff's injuries based on its interpretation of MCL 324.73301.

ARGUMENT

Defendant attempts to create an issue of legal significance regarding the interpretation of MCL 324.73301 in a misguided venture to eviscerate the common law of outdoor premises liability. Defendant over zealously misconstrues the statute as a bar to all outdoor recreational injuries by skimming over the plain language of the statute properly applied in *Wymer v Holmes*, 429 Mich 66; 412 NW2d 213 (1987) as required the Legislature. Defendant's premise

is fatally flawed in that he omits the phrase pivotal to the statute's application in this case: "for the purpose of". Moreover, MCL 324.81101 et seq; MSA 13. 81101 et seq. ("ORV") imposes liability on defendant for his negligence irrespective of the applicability of MCL 324.73301. The rules of statutory construction dictate that when statutes conflict a specific statute prevails over a general statute. As such the ATV statutes imposing liability would trump any MCL 324.73301 immunity even if it does apply to defendant's land. Finally, MCL 324.73301 does not abrogate traditional common law premises liability standards as set forth in *Preston v Sleziak*, 383 Mich 442; 175 NW2d 759 (1970).

I. THE COURT OF APPEALS PROPERLY RULED THAT MCL 324.73301 DID NOT APPLY TO PLAINTIFF'S CLAIM FOR INJURIES SUSTAINED ON A DEVELOPED AREA OF DEFENDANT'S BACKYARD WHILE RIDING AS A PASSENGER ON THE BACK OF AN ATV DURING A SOCIAL VISIT.

The legal principles with respect to the application of MCL 324.73301 are well recognized. The plain language, legislative history and case law clearly establish that there was absolutely no intention by the Legislature to immunize all outdoor activities much less those occurring on in the backyard of a residential home that is not open for recreational use by the general public. The statute's plain language specifically addresses the intent of the person when entering the land, "any person who is on the land . . . *for the purpose of* . . . and other outdoor *recreational use*. MCL 324.73301 does not apply to injuries incurred by a person who does not enter the land for the purpose of engaging in recreational use of the land.

Moreover, statutory interpretation and application by the *Wymer* court has been recognized as proper by the Legislature with the amendments and reenactment of MCL 324.73301 et seq.

A. Rules of Statutory Construction.

When construing statutes the primary task is to discern and effect the intent of the Legislature as expressed in the words of the statute. *DiBenedetto v West Shore Hospital*, 461 Mich 394, 402; 605 NW2d 300 (2000). A statute's provisions are not construed in isolation, but in context. *Sun Valley Foods Co v Ward*, 460 Mich 230; 596 NW2d 119 (1999). If the statutory language is clear and unambiguous, we assume the Legislature intended its plain meaning, and the statute is enforced as written. No further judicial construction is necessary or permitted. *In re MCI Telecommunications Corp.*, 460 Mich 396, 413; 596 NW2d 164 (1999). It is important to ensure that words in a statute not be ignored, treated as surplusage, or rendered nugatory. *Robertson v Daimler Chrysler Corp.,* 465 Mich 732; 641 NW2d 567 (2002). It is a cardinal rule of interpretation that effect shall be given to every word, phrase, or clause of a statute. *Id.* Undefined statutory terms must be given their plain and ordinary meanings. *Cox ex rel. Cox v Board of Hosp Managers for the City of Flint*, 467 Mich 1; 651 NW2d 356 (2002). When determining the common, ordinary meaning of a word or phrase, consulting a dictionary is appropriate. *Stanton v City of Pontiac*, 466 Mich 611; 647 NW2d 508 (2002). Finally, the omission of a provision in one part of a statute that is included in another part should be construed as intentional, and seeming inconsistencies should be reconciled if possible. *Estes v Idea Engineering & Fabrications, Inc.*, 250 Mich App 270; 649 NW2d 84 (2002).

B. Plain Meaning of the Statute.

The primary focus in determining the statute's application to the case before this Court is the plain language of section (1) of the statute. Although Defendant agrees that the plain meaning of the statute should be applied, he completely ignores the rules of statutory construction and omits from his analysis critical words key to the interpretation and application of it. In doing so his contention that the statute is a bar to any claim for outdoor injuries sustained while engaging in any activity conceivably construed as recreation is completely untenable.

The statute as written states:

> (1) Except as otherwise provided in this section, a cause of action shall not arise for injuries to a person who is on the land of another without paying to the owner, tenant, or lessee of the land a valuable consideration for the purpose of fishing, hunting, trapping, camping, hiking, sightseeing, motorcycling, snowmobiling, or any other outdoor recreational use or trail use, with or without permission, against the owner, tenant, or lessee of the land unless the injuries were caused by the gross negligence or willful and wanton misconduct of the owner, tenant, or lessee.

In order for MCL 324.73301 to bar plaintiff's claim for injuries the following elements must be established:

1) Plaintiff was on the land of another without paying the owner consideration;

2) Plaintiff was on the land for the purpose of any other outdoor recreational use or trail use; and

3) Plaintiff's injuries were not caused by the gross negligence or willful and wanton misconduct of the owner.

Plaintiff concedes that the first element is established. Plaintiff, however, contends that defendant cannot establish elements 2 or 3 given the uncontroverted testimony and evidence in this case. Although defendant concludes that he has established the second element, it is in error. First, ATV use does not constitute "motorcycling" or "trail use". ATV use is clearly defined and governed by MCL 324.81101 et seq. Trailways are defined and governed by MCL 324.72101 et seq.; MSA 13A.72101 Even assuming arguendo that ATV use is an outdoor recreational use, the phrase consisting of four critical words that precedes any of the enumerated activities cannot be ignored. Defendant's omission of "for the purpose of" is fatal to his argument that MCL 324.73301 bars plaintiff's claim.

To begin, the person must be on the land "for the purpose of" engaging in a recreational activity. Plaintiff submits that this language is plain and unambiguous, as did the court in *Wymer,* courts post *Wymer* and statutory amendments.

Notwithstanding, and to the extent it is not to defendant, it is helpful to consult the dictionary for the plain meaning of "purpose". *Merriam-Webster Collegiate Dictionary* (OnLine ed 2003) and *Webster's Ninth New Collegiate Dictionary* defines purpose as: 1a: something set up as an object or end to be attained: INTENTION: b: RESOLUTION, DETERMINATION.

By the plain language of the statute the intent of the person entering the land must be to engage in one of the enumerated activities. Thus, in order to bar a cause of action for injuries the statute requires a finding that the injured person

came upon the land with the specific intent of using the land for recreational use. The plain language of the statute and legislative intent makes it clear that MCL 324.81101(1) does not apply to individuals who, incidental to a social visit may stroll around in the invitor's backyard, lounge on the invitor's backyard deck, swim in the invitor's swimming pool, or play a game of badminton, horseshoes or tennis on the invitor's property.

The courts across this state have made it clear that central to the determination of a landowner's liability is the purpose of going on the land. *Wymer, supra.* (See also *Thomas v Consumers Power Co*, 58 Mich App 486, modified on other grounds, 394 Mich 459, 495-496; 228 NW2d 786 (1975) the plaintiff was on the land of the Saginaw County Agricultural Society for the purpose of snowmobiling). In *Syrowik v City of Detroit,* 119 Mich App 343; 326 NW2d 507 (1982), a case defendant relies heavily on, the plaintiff was on the Dorias Playfield for the purpose of tobogganing.[3] In *Winiecki v Wolf,* 147 Mich App 742; 383 NW2d119 (1986), the plaintiff intended to visit with relatives and engage in recreational use of the land. The plaintiff brought "land skis" onto defendants' property which were used to play a land ski game down one of defendants' hills. Having done so, the Court of Appeals found that the plaintiff had come upon defendants' land "for the purpose of an outdoor recreational use" in addition to visiting relatives, and therefore MCL 300.201 gave immunity to the landowner.

---

[3] Presumably overruled by *Pohutski, supra.*

In the case at bar, it is uncontroverted that Julie Neal did not go to the Defendant's residence for the purpose of engaging in any outdoor activity or the recreational use of Defendant's property. Julie Neal went to visit the Defendant at a "get together". The use of the defendant's ATV's were purely happenstance.

Second, the use to which the land is put must be an "outdoor recreational use" as that term is used in the context of the statute. The Legislature in the amendments to the Michigan statute used the term "use" rather than a term such as "activity". A "use" in the context of the statute implies a specific purpose to which the land is applied, rather than mere presence upon the property.

A social visit to a friends' residence in which incidental outside play is involved does not constitute an "outdoor recreational use" of the property as that term was contemplated by the Legislature. In the case at bar, the riding of ATV's is not a specific purpose to which the land is applied. The specific use for defendant's property is a private residential home. There is no credible evidence that the land is open much less used by members of the general public.

If Julie Neal went to the defendant's house intending to ride the ATV's, then perhaps it could be argued that the statute would be applicable. However, the record is replete with evidence that Ms. Neal's only purpose for going to defendant's home was to socialize with friends. Moreover, the unequivocal testimony of all witnesses is that the impromptu riding of the ATV's was incidental to the social visit.

Equally untenable, is defendant's argument that the use of present tense in referring to the injured person supports the statutory application of

immunity whenever the injured person is engaged in any outdoor activity that can conceivably be construed as recreation. In doing so, defendant ignores virtually the entire text of the statute, as well as takes select language totally out of context. The suggested interpretation breaks every rule of statutory construction, and is absurd. There is absolutely no evidence that at the time plaintiff was injured her sole purpose for being at the defendant's house was for recreational use of his land. The application of MCL 324.73301(1) to every outdoor activity would be germane wiping out common law premise liability and every individual would be treated as a trespasser.

Moreover, the statute did not abrogate common law premise liability. If one were to adopt defendant's position a social guest could avoid application of the statutory immunity by merely giving consideration to the landowner. Such a proposition is absurd. Because statutes are construed so as to prevent absurd results, injustice, or prejudice to the interests of the public, rejection of defendant's proposed interpretation and application is imperative. *Armstrong v Ypsilanti Charter Twp*, 248 Mich App 573; 640 NW2d 321 (2001).

Finally, there is evidence sufficient to establish that there is a genuine issue of material fact establishing element 3, gross negligence. In *Thomas, supra,* the Michigan Supreme Court enunciated the standard of gross negligence gross negligence under MCL 300.201. The court reversed a summary judgment entered in favor of the defendant insofar as the decision of the lower court purported to adjudicate the plaintiff's claim of gross negligence under MCL 300.201. The court's abbreviated opinion noted that the defendant had alleged

knowledge of the unmarked guy-wires struck by plaintiffs, as well as the threat presented by it to permissive users. The plaintiff alleged that the defendant could have rectified the dangerous situation but failed to take any action. The court held that these allegations were sufficient to raise a question of fact for jury resolution with regard to whether the defendant's conduct constituted a breach of the standard of case. Thus gross negligence exists where there is 1) knowledge of a situation requiring the exercise of ordinary care and diligence to avert injury to a permissive user of the land; 2) ability to avoid resulting harm by ordinary care and diligence, and; 3) the omission to use such care and diligence to avert the threatened danger.

In this case respectively: 1) defendant knew plaintiff had no ATV experience and had never ridden an ATV before; 2) defendant knew the ATVs were not to be operated at a rate of speed not reasonable or proper; 3) defendant knew that passengers were forbidden on his ATVs; 4) defendant knew that helmets were required to be worn when riding an ATV; 5) defendant knew that ATVs were not allowed to be driven within 300 feet of a dwelling; 6) defendant knew or should have known his brother did not have a driver's license (Appx Sanchez dep 57b, p. 46:12-20);[4] 7) defendant knew about the hidden ridges in his lawn, by his own admission (Appx Wilkes dep 26a, pp. 26-27); plaintiff didn't know how to ride the ATV's (Appx Sanchez dep 50b, 12:25), you can't see the ridges and you have to standup to take them when you are riding. (Appx Sanchez dep 57b, pp. 45:20 - 46:3); 8) defendant knew this, he rode over

[4] Violation of a MCL 324.81133 ORV statutes; prohibited acts.

them when he cut the grass the same day and he has for 12 years (Appx Wilkes dep 24a, p. 26:14); 9) he should have warned plaintiff about them, and; 10) defendant did not say anything about the above to plaintiff by his own admission. (Appx Wilkes dep 24a, p. 28:19-22).

The above resulted in catastrophic injuries to plaintiff.

In consideration of the above, plaintiff submits that the plain language of MCL 324.73301(1) precludes its application to this case because defendant cannot establish the requisite elements. Plaintiff submits proceeding to defendant's argument is moot. Notwithstanding, for the purposes of this submission, the remaining issues this Court requested to be briefed are set forth below.

II. THE LEGISLATURE MADE IT CLEAR WITH THE 1993 AMENDMENT ADDITION OF MCL 324.73301(2) THAT MCL 324.73301(1) DOES NOT APPLY TO RESIDENTIAL PROPERTY.

A. Significance of Legislative Amendments.

In determining the applicability of MCL 324.73301(2) to residential property it is fundamental to understand the significance of legislative amendments historically recognized by the courts. It is well established that the Michigan Supreme Court will find legislative concurrence when legislation which has been authoritatively construed by the courts and then is retained by the Legislature. *Rogers v City of Detroit*, 457 Mich 125; 579 NW2d 840 (1998). Moreover, the Legislature in proceeding with process of amending, codifying, or re-enacting maturely purposed statute is entitled to depend trustfully on the word of the court whenever that word appears precisely and unanimously. *In re Martiny Lakes*

Project, 381 Mich 180; 160 NW2d 909 (1968). When the Legislature codifies judicially defined requirements without defining it itself, the logical conclusion is that the Legislature intended to adopt the judiciary's interpretation of that requirement. *Pulver v Dundee Cement Co*, 445 Mich 68; 515 NW2d 728 (1994). Finally, it is important to remember that amendatory acts are not to be considered in isolation, but are to be construed in the context of the act which it is designed to amend. *Wymer, supra* at 76.

B. Legislative Analysis

In applying these principles to MCL 324.73301 and the arguments suggested by defendant it is noteworthy that the amendments pre-*Wymer* appear to mirror the post-*Wymer* in that the changes reflect the intent articulated by the Legislature decades ago. The purpose of enacting the statute was to open up vast tracts of land in a relatively natural state to members of the public for recreational use. In recognition of the statute's purpose and the impracticability of keeping the land safe the liability was limited for injuries incurred on the land. Over the years the Legislature has consistently expanded the scope of the statute in recognition of an increase in public participation of recreation with the addition of enumerated activities.

When a legislative amendment is enacted soon after a controversy arises regarding the meaning of an act, it is logical to regard the amendment as a legislative interpretation of the original act. *Adrian School Dist. v Michigan Public Schools Employee Retirement System*, 458 Mich 326; 582 NW2d 767 (1998). Early on the courts struggled with the application of this statute. In recognition of

judicial misapplication of the statute, the Legislature dropped "guest" out of the title with an amendment in 1974. The amendment recognized that the statute was not intended to apply to the guests of landowners. The statute pre and post amendment appeared as follows:

> **300.201 Liability of landowners for injuries guests; gross negligence, willful and wanton misconduct. [MSA 13.1485]**
>
> 1964 PA 199, Effective May 22, 1964.
> (Emphasis added.)

> **300.201 Liability of landowner, tenant, or lessee for injuries to persons on property for recreational purposes. [MSA 13.1485]**
>
> 1974 PA 177, Effective June 23, 1974.
> (Emphasis added.)

It is important to recognize the amendment made to the statute by the Legislature after *Wymer* was argued, but before the Michigan Supreme Court on November 14, 1986. The Legislature was cognizant of the controversy relating to the application of the statute by the parties in *Wymer* immediately introduced, passed and enacted 1987 PA 110. The act was effective July 13, 1987. Thereafter, *Wymer* was decided September 24, 1987.

> **300.201 Liability of landowner, tenant, or lessee for injuries to persons on property for purpose of outdoor recreation, gleaning agricultural or farm products, fishing or hunting, or picking and purchasing agricultural or farm products at farm or "u-pick" operation; definition. [MSA 13.1485]**
>
> 1987 PA 110, Effective July 13, 1987.
> (Emphasis added.)

The Legislature changed "for recreational purposes" to "for the purpose of outdoor recreation". In doing so it made it crystal clear that the statute was not

being properly applied absent a determination of the intention for the individual going on the land of another.

C. Wymer Holding

The unanimous decision reached by the entire bench in *Wymer* properly shifted the focus of landowner liability from the status of the person on the land to the purpose for going on the land. In doing so it recognized that the statute was not intended to restructure common-law premise liability.[4] *Id.* at 79.

The court recognized that it must read the language, not in isolation, but in light of the general purpose to be accomplished. *Id.* at 76. In doing so it recognized and reiterated the legislative purpose as promoting tourism and in opening up and making available vast areas of vacant but private lands to the use of the general public. *Id.* at 77-78. (Emphasis added.)

The *Wymer* court through legislative analysis concluded:

> The commonality among all these enumerated uses is that they generally require large tracts of open, vacant land in a relatively natural state. This fact and the legislative history of MCL 324.73301 make clear to us that the statute was intended to apply to large tracts of undeveloped land suitable for outdoor recreational uses. Urban, suburban, and subdivided lands[5] were not intended to be covered by MCL 324.73301. The intention of the Legislature to limit owner liability derives from the impracticability of keeping certain tracts of land safe for public use.
>
> (*Id.* at 79. Emphasis added.)

---

[4] There is no evidence that the Legislature intended a major restructuring of Michigan common law liability. *Wymer, supra* at 79. Otherwise, it would apply to all private property including backyards.

[5] The Court in *Ellsworth v Highland Lakes*, 198 Mich 55 (1993) defined "suburb" as an outlying part of a city or town; a smaller place adjacent to or sometimes within commuting distance of a city; the residential area on the outskirts of any city or large town.

In appropriately shifting the focus *Wymer* held in determining the liability of a property owner the focus is:

1) The character of the land; and

2) The purpose of the person going on the land.

Following *Wymer* the Court of Appeals held that MCL 324.73301 did not apply to backyards. See *Harris v Vailliencourt*, 170 Mich App 740 (1988); *Glittenburg v Wilcenski*, 174 Mich App 321; 435 NW2d 480 (1989); *Forche v Gieseler*, 174 Mich App 588; 436 NW2d 437(1989).

The *Forche* court stated:

> Our Supreme Court held MCL 324.73301 inapplicable to premise liability claims brought by social guests for recovery of personal injuries that occur in urban and suburban areas. *Wymer v Holmes*, 429 Mich 66; 412 NW2d 213 (1987).
>
> *Id.* at 593. (Emphasis added.)

As recognized by the *Wymer* court, the *Forche* court also made it clear that MCL 324.73301 did not eviscerate the traditional premises liability standards as set forth in *Preston*, *supra*, holding that MCL 324.73301 did not apply to social guests.

D. Post Wymer Amendments

The first post *Wymer* amendment in 1993 makes it clear not only was the *Wymer* decision consistent with the legislature's intent, but that the Legislature did not intend to expand or limit it in any way. The amendment did not make any appreciable alteration to section (1) which applies to this case. It did, however,

make it clear that the act applied to public lands contrary to the holding in *Ballard, supra* with the adoption of section (2).

The amended statute in pertinent part provides:

> **324.73301 Liability of landowner, tenant, or lessee for injuries to persons on property for purpose of outdoor recreation or trail use, using Michigan trailway or other public trail, gleaning agricultural or farm products, fishing or hunting, or picking and purchasing agricultural or farm products at farm or "u-pick" operation; definition. [MSA 13A.73301]**
>
> (1) Except as otherwise provided in this section, a cause of action shall not arise for injuries to a person who is on the land of another without paying to the owner, tenant, or lessee of the land a valuable consideration for the purpose of fishing, hunting, trapping, camping, hiking, sightseeing, motorcycling, snowmobiling, or any other outdoor recreational use or trail use, with or without permission, against the owner, tenant, or lessee of the land unless the injuries were caused by the gross negligence or willful and wanton misconduct of the owner, tenant, or lessee.
>
> (2) A cause of action shall not arise for injuries to a person who is on the land of another without paying to the owner, tenant, or lessee of the land a valuable consideration for the purpose of entering or exiting from or using a Michigan trailway as designated under part 721 or other public trail, with or without permission, against the owner, tenant, or lessee of the land unless the injuries were cause by the gross negligence or willful and wanton misconduct of the owner, tenant, or lessee. For purposes of this subsection, a Michigan trailway or public trail may be located on land of any size including, but not limited to, urban, suburban, subdivided, and rural land.
>
> 1993 Public Act 26
> (Emphasis added.)

The Legislature recognized the need to move away from the exclusionary holding of *Wymer* for a very limited purpose with the expansion of public trails and statutory provisions relating to the use of trailways. It is critical to recognize the language adopted by the Legislature in section (2):

"For purposes of this subsection . . .may be located on land of any size including, but not limited to, urban, suburban, subdivided, and rural land". This language was not added to section (1) of the statute. In doing so the Legislature made clear its concurrence of the exclusionary language in the unanimous holding of *Wymer* and decisions thereafter. The Legislature, as entitled, relied on the precise and unanimous holding in *Wymer* remaining the law of the land.

Specifically, section (1) does not apply to urban, suburban, and subdivided lands.[6] The Legislature again affirmed and relied on the unanimous decision of the *Wymer* court and decisions thereafter when MCL 300.201et seq was repealed 1994 PA 451 and recodified by 1995 PA 58, as part of the Natural Resources and Environmental Protection Act at MCL 324.73301, MSA 13A.73301 in virtually the same form as it was repealed by 1995 PA 58. Once again there was no change in the language in section (1) other than to provide for trail use as defined by section 721.

Accordingly, if the Legislature intended the statute to apply to residential lands it would have added to section (1) the language "including, but not limited to, urban, suburban, subdivided, and rural land". It did not. Since the Legislature has spoken, the Court must apply the statute as enacted and intended. In doing so it is important for this Court to remember that amendatory acts are not to be

---

[6] The Court in *Ellsworth v Highland Lakes*, 198 Mich 55 (1993) defined "suburb" as an outlying part of a city or town; a smaller place adjacent to or sometimes within commuting distance of a city; the residential area on the outskirts of any city or large town.

considered in isolation, but are to be construed in the context of the act which it is designed to amend. *Wymer, supra* at 76. Plaintiff submits that since the Legislature has made it clear that MCL 324.73301(1) does not apply to residential property. As such, it should not be necessary to address defendant's arguments for same. To the extent this Court concludes otherwise, Ms. Neal has addressed defendant's argument with respect to the character of the land.

1. Defendant's Focus on "Relatively Natural" Ignores the Facts and Law.

The crux of defendant's argument is based on the interpretation of "relatively natural state". As briefed above, defendant ignores two important facts 1) the purpose of Plaintiff going to defendant's home; 2) the specific purpose that defendant's land is applied is not recreational but residential use. These preclude the need for the Court to address this issue.

Defendant completely ignores the fact that his land is not vacant and has been developed and maintained by him for over a decade. There is no evidence, as claimed in defendant's brief, p. 9, that Ms. Neal was injured on a worn path or that the defendant did not fertilize, grade, clear, landscape, change, or alter the area where the injury occurred. To the contrary, the uncontroverted evidence is that the area where plaintiff was injured was the area defendant testified he kept well maintained and well groomed. It is not an area that is difficult to maintain, make safe or supervise. This is obvious from the photographs too.

Defendant's self-serving affidavit has absolutely no evidentiary value. Defendant admitted in his deposition, to which admissions he is bound, *Palazzola*

v Karmazin Products Corp, 223 Mich App 141; 565 NW2d 867 1997), lv app den 458 Mich 854; 857 NW2d 633 (1998) that the he had mowed the lawn the very same day and had mowed and maintained it for the 12 years that he owned it. When an affidavit contradicts the affiant's own pretrial deposition testimony, it is not to be accepted absent a convincing explanation for the change. *Gamet v Jenks*, 38 Mich App 719; 726, 197 NW2d 160 (1972). Obviously defendant's affidavit submitted by his new counsel more than 7 months after his deposition flatly contradicts his testimony. If those assertions related to changes over the course of discovery it would be understandable, but the affidavit flatly contradicts what defendant previous testified to have himself known and done. This can no more be tolerated than contradicting deposition testimony when its negative effect is appreciated. Accordingly defendant's analysis of *Ellsworth v Highland Lakes Development*, 198 Mich App 55; 498 NW2d 5 (1993); *Wilson v Thomas L. McNamara, Inc*, 173 Mich App 372; 433 NW2d 851, lv app den, 433 Mich 872 (1988) are misplaced.

2. Character of Defendant's Land.

Moreover, defendant's argument that defendant's property is not urban, suburban or subdivided as affording him immunity fails to recognize more than just the facts, it totally ignores the legislative amendment and provisions with the addition of (2). There is no doubt, as set forth in the facts, the statute does not apply to defendant's land. It is situated in a subdivision surrounded by highways. As is evident from the photographs and testimony a substantial portion of it is maintained by the defendant himself.

MCL 324.73301(1) does not apply to residential land. Defendant's property is located in a subdivision that is surrounded by highways. In addition, the land where Ms. Neal sustained her injuries was on the lawn that the defendant had mowed that very day as he had for over 12 years.

III. OFF- ROAD RECREATION VEHICLE STATUTES IMPOSE LIABILITY ON DEFENDANT FOR NEGLIGENCE IRRESPECTIVE OF THE APPLICABILITY OF MCL 324.73301

A. ORV Statutes.

In 1975 legislation was passed relating to off-road recreation vehicles for the purpose of regulating use and imposing liability and penalties for failure to comply with restrictions on use on public and private land. These statutes are known as MCL 324.81101 et seq; MSA 13.1485 et seq. ("ORV") The ORV statutes have been repeatedly amended over the years. These amendments consistently continue to impose restrictions on the ownership, maintenance and use in a manner similar to the motor vehicle, water craft and snowmobile statutes a imposing both civil and criminal penalties for violation of its provisions.[7] There is no provision for immunity in these statutes for an individual like defendant. The only provision of for immunity in the ORV statute is that which is already afforded to government and municipal agencies and individuals. MCL 324.81131; MSA 13.81131.

[7] 1994 repealed; re-enacted by 1995 PA 58, 1997 PA 102

Some of the most salient provisions applicable to the case at bar include in by way of illustration the following:

324.81133 Operation of ORV; prohibited acts. [MSA 13.81133]

A person shall not operate an ORV:

(a) At a rate of speed greater than is reasonable and proper, or in a careless manner having due regard for conditions then existing.

(b) Unless the person and any passenger in or on the vehicle is wearing on his or her head a crash helmet and protective eyewear approved by the United States department of transportation. This subdivision does not apply if the vehicle is equipped with a roof that meets or exceeds standards for a crash helmet and the operator and each passenger is wearing a properly adjusted and fastened safety.

(h) Within 100 feet of a dwelling at a speed greater than the minimum required to maintain controlled forward movement of the vehicle, except on property owned or under the operator's control or on which the operator is an invited guest, . . .

(t) While transporting any passenger in or upon an ORV unless the manufacturing standards for the vehicle make provisions for transporting passengers.

(u) On adjacent private land, in an area zoned residential, within 300 feet of a dwelling at a speed greater than the minimum required to maintain controlled forward movement of the vehicle except on a roadway, forest road, or forest trail maintained by or under the jurisdiction of the department, or on an ORV access route as authorized by local ordinance.

324.81140a Suspension or revocation of operator's or chauffeur's license; operation of ORV prohibited; violation as misdemeanor; penalty. [MSA 13.81140]

(1) If the operator's or chauffeur's license of a person who is a resident of this state is suspended or revoked by the secretary of state under the Michigan vehicle code, 1949 PA 300, MCL 257.1 to 257.923, or if the driver license of a person who is a nonresident is suspended or revoked under the law of the state in which he or she resides, that person shall not operate an ORV under this part for the same period.

(2) A person who violates this section is guilty of a misdemeanor punishable as follows:

(a) For a first conviction, imprisonment for not more than 93 days or a fine of not more than $500.00, or both.

(b) For a second or subsequent conviction, imprisonment for not more than 180 days or a fine of not more than $1,000.00, or both.

324.81143 Accident resulting in injury, death, or property damage; notice; report; report by medical facility; collection and evaluation of information; duties of operator. [MSA 13.81143]

(1) The operator of a vehicle involved in an accident resulting in injuries to, or the death of, a person, or resulting in property damage in an estimated amount of $100.00 or more, shall immediately, by the quickest available means of communication, notify a state police officer, or the sheriff's office of the county in which the accident occurred. The police agency receiving the notice shall complete a report of the accident on forms prescribed by the director of the department of state police and forward the report to the department of state police and the department.

(4) The operator of a vehicle involved in an accident upon public or private property resulting in injury to or the death of a person shall immediately stop at the scene of an accident and shall render to any person injured in the accident reasonable assistance in securing medical aid or transportation.

There can be no dispute that the ATV's involved in this case are defined by the statute as ORV's regulated by the statute.

B. Rules of Statutory Construction.

In general, where statutes relate to the same subject matter, they should be read, construed and applied together to distill the Legislature's intent. *In re MCI Telecommunications Corp.*, *supra* at 412. Contemporaneous statutes should be construed together, and where there are two acts, one of which is

special and particular and includes the matter in question, and the other general, which, if standing alone, would include the same matter, and thus conflicts with the special act, special act must be taken as intended to constitute an exception to the general act. *Winter v Shafter*, 317 Mich 259; 26 NW2d 893 (1947). When two legislative enactments seemingly conflict, specific provision prevails over more general provision. *Frame v Nehls*, 452 Mich 171; 550 NW2d 739 (1996).

In this case both MCL 324.73301 and MCL 324.81101 apply. The former was enacted to limit liability, while the latter imposes liability. The former applies to all types of recreational use of land, while the latter is limited to recreation involving the use of ORV. The ORV statute as the latter and specific statute applies to this case.

C. Negligence Predicated on Violation of Penal Or Safety Statutes.

It is well established that statutes may establish a standard of conduct with sufficient precision that violation of such a standard is declared for the imposition of tort liability. Where a negligence action involves a defendant's violation of a penal or safety statute or regulation, a plaintiff is entitled to the benefit of a rebuttable presumption of negligence in establishing his or her prima facie case. In Michigan, the rule is that evidence of a violation of a penal or safety statute creates a rebuttable presumption of negligence, which may be rebutted by evidence of a legally sufficient excuse for the statutory violation. If the evidence is rebutted, it is then for the jury to determine whether violation of the statute was

a proximate cause of the accident. *Klansek v Anderson Sales & Service, Inc*, 426 Mich 78, 86; 393 NW2d (1986).

In order to establish a statutory violation a plaintiff must prove the following:

1. The defendant violated a statute intended to protect against the very result at issue;
2. The evidence will support a finding that the violation was a proximate contributing cause of the injury or death;
3. The occurrence resulting in the injury or death was of a nature that the statute was designed to prevent; and
4. The victim was among the class of persons for whose protection the statute was adopted.

The alleged wrongdoer must also be within the class to whom the statute was intended by the legislature to apply. *Hottmann v Hottmann*, 226 Mich App 171, 179; 572 NW2d 259 (1997).

The first two conditions are normally questions of fact for the jury. The remaining are always legal issues for the trial court. *Klanseck, supra*

In this case the plaintiff need only prove that defendant was negligent to prevail in her action for damages. It is uncontroverted that at a minimum the defendant violated the ORV statutes enumerated above which were intended to avoid the injuries sustained by Ms. Neal. Interestingly, defendant attempted to shift liability to plaintiff for riding as a passenger on the back of the ATV, failing to recognize his statutory and common law duties. Defendant also knew that his

brother did not have a valid driver's license, and hadn't for years. Defendant undoubtedly knows the reason and yet still allowed his brother to drive the ATV resulting in injury to Ms. Neal. Clearly, the defendant is in the class to whom the ORV is intended not only to apply, but to impose penalties. Defendant should not be insulated from his violations of the statutes.

IV. A DECISION BY THIS COURT TO REVERSE *WYMER* OR *BALLARD* IS NOT OUTCOME DETERMINATIVE IN THIS CASE

Although Plaintiff submits that the *Wymer* court reached the right result for the right reasons, the textualist approach seemingly preferred by this Court in recent years, would probably disagree with the analysis employed by the *Wymer* court in reaching its decision. The *Wymer* court properly shifted the focus from the status of the user to the purpose of the person entering the land. The remainder of the *Wymer* holding should not be reversed because the Legislature affirmed the statutory interpretation and application with the amendments and reenactment post *Wymer* as set forth in detail above.

Ballard v Ypsilanti Twp, 457 Mich 564; 577 NW2d 890 (1998) is inapplicable to the case at bar. *Ballard* involved claims, brought by the estates of two young boys who drowned, against Ypsilanti Township and individual employees who were responsible for maintaining the township's park. The claims were premised on theories of willful and wanton misconduct against the township and gross negligence against the individual employees responsible for the maintenance of the park. The issue before the *Ballard* court was whether the Recreational Land Use Act ("RUA") MCL 300.201 create an exception to

governmental immunity created by Governmental Tort Liability Act ("GTLA") MCL 691.1407; MSA 3.996. In reaching its decision the *Ballard* court analyzed he interplay between the GTLA and the RUA. Because the express language did not except public land from the RUA, the court held that the RUA was not intended to create an exception to governmental immunity. It concluded the RUA did not apply to public lands.

Based on the amendments to MCL 324.73301 it is clear that it does apply to public lands. The statutory analysis of the Ballard Court of Appeals was essentially that which this Court employed in recent decisions such as *Pohutski, supra.* Applying the *Pohutski* holding to *Ballard* the claims would be barred because one of the five narrowly drawn exceptions to governmental immunity was not enumerated. In addition, the holding that MCL 324.73301 does not apply to public lands should be reversed. The statutory language in Ballard is clear at least as it related to section (2). *Ballard* is clearly a case that reached a result for reasons and analysis that are not supported by this Court's recent decisions. For the forgoing reasons *Ballard* should be reversed for reasons unrelated in any way to the facts of the case at bar.

V. THE RESOLUTION OF THIS CASE WILL NOT AFFECT THE GENERAL BODY OF PRINCIPLES GOVERNING OUTDOOR PREMISE LIABILITY

It has been well established that well-settled common law principles are not to be abolished by implication, and when ambiguous statute contravenes the common law, it must be interpreted so as to make the least change in the

common law. *Heinz v Chicago Road Investment Co.,* 216 Mich App 289, app den 455 Mich 865; 549 NW2d 47 (1996).

MCL 324.73301 does not change the common law that is universally recognized with duties owed by owners and occupiers of property to those who come upon the property as merely licensees. *Thomas, supra.* The statute has the purpose of furthering recreational activities by making certain areas available for such purposes while clearly restating the common-law liability of owners to those who come gratuitously on their land. *Id.*

The resolution of this case will not affect the common law principles governing outdoor premise liability because 1) the ORV statutes impose liability to defendant for his acts and omissions; 2) MCL 324.83301 does not apply to the defendant's property; and 3) even if MCL 324.83301 applied, at a minimum the evidence establishes a genuine issue as to whether defendant's acts and omissions constituted gross negligence excepting him from the statutory immunity.

VI. IF THIS COURT RULES THAT PLAINTIFF'S CLAIM IS BARRED BY MCL 324.73301 THIS CASE IS PROPERLY REMANDED TO THE COURT OF APPEALS

Based on the foregoing arguments, this Court should affirm the Court of Appeals remand to the trial court for further proceedings. Succinctly stated, MCL 324.73301 does not bar Ms. Neal's claim against defendant for her injuries because: 1) negligence predicated on violations of ORV statute trumps MCL 324.73301 immunity; 2) MCL 324.73301 does not apply to defendant's property;

and 3) the statutory imposition of liability coupled with the evidence before the Court at a minimum establishes a question of fact as to gross negligence.

In the event that this Court rejects Ms. Neal's arguments, this case should be remanded to the Court of Appeals for consideration of the issues raised in plaintiff's appeal it did not deem necessary given its determination that MCL 324.73301 did not apply to defendant's property.

Finally, if this Court over rules *Wymer,* or deems appropriate to correct its statutory interpretation in any respect, the decision should be applied prospectively. This Court cannot ignore the reliance of Ms. Neal and injured individuals like her on *Wymer*. Because *Wymer* has become so widely accepted and applied by courts for over 15 years to do otherwise would result in undue hardship on Ms. Neal and injured individuals like her.

REQUESTED RELIEF

Based on the foregoing, Plaintiff-Appellee, Julie Neal, respectfully requests that this Honorable Court affirm the Court of Appeals reversal of the trial court's order and remand this case to the Eaton County Circuit Court for further proceedings.

Date: January 31, 2003

TRACI M. KORNAK (P45468)
TRACI M. KORNAK P.C.
Attorney for Plaintiff-Appellant
600 McKay Tower
146 Monroe Center, N.W.
Grand Rapids, Michigan 49503
(616) 458-8000